In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 150

THE TRAILMOBILE COMPANY, PETITIONER

v.

THOMAS BRITT AND ROY EDWARD MAPPES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

This case arises out of two consolidated suits brought by respondent veterans, represented by the Government as statutory counsel, to recover the full amount of wages due to them during the first year of their reemployment under Section 8(c) of the Selective Service and Training Act of 1940, as amended (54 Stat. 890, 50 U. S. C. App. 308). The broad question which appears to be presented by the judgment below is whether, during the first year of a veteran's reemployment, his preinduction seniority position can be adversely changed by the

usual processes of collective bargaining.[1] This question, one of undoubted importance, has never been directly decided by the court in a case involving a veteran's first year of reemployment, although the Court has emphatically indicated, in each of its decisions on the subject of veterans' reemployment rights, that such a special statutory right exists and should be respected. *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U. S. 275, 286; *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 56, 58-60; *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U. S. 521, 529; *Oakley* v. *Louisville & Nashville R. R. Co.*, 338 U. S. 278, 283. If the Court deems this question to be properly before it herein, we do not oppose the granting of the petition in order definitively to settle the issue, as well as to clarify this important subject which the opinion below leaves in a potentially confused state.

Since petitioner seems to insist that the case presents only narrow issues relating to the application by the court below of conventional doctrines of *res judicata* to the particular facts of this case (Pet. 2-3)—issues which we believe to be of no general importance—we are directing this memorandum mainly to a showing that the case presented by the record and decisions below does involve the

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[1] While the case arises under the Selective Service and Training Act of 1940, comparable provisions are in the Selective Service and Training Act of 1948 (62 Stat. 615, 50 U. S. C. App. (1950 Supp.) 459), which was continued in force by the Selective Service Extension Act of 1950 (P. L. 599, 81st Cong., 2d sess.).

"extraordinary statutory protection" which, this Court has said, is granted by Section 8(c) of the Selective Service and Training Act of 1940 to veterans during the first or statutory year of their reemployment.

1. The question of "extraordinary statutory protection" is clearly the issue presented by the pleadings, which constitute the basic record, since the case arises upon a motion to dismiss the complaints.

Both Britt and Mappes were, prior to their military service, employees of the Highland Body Manufacturing Company (R. 2, 15). During 1943, the Highland Body Company was absorbed by the Trailmobile Company and its employees and physical equipment transferred to the Trailmobile Plant, effective January 1, 1944 (R. 2, 14). The Trailmobile Company agreed to assume and perform all of Highland's outstanding contracts (R. 2). A collective bargaining agreement in force at the time Britt and Mappes entered military service provided for seniority dating from the last date of hiring (R. 3, 15).

Britt entered military service in December 1942. He returned on November 11, 1945, and was restored to his former position on January 2, 1946, but on November 23, 1946, he was notified that his seniority would be reduced to commence on January 1, 1944. The reason for this reduction of his seniority was that, after the merger, the Company had entered into a new collective bargaining agreement

which modified the seniority of all Highland employees to commence from the date of the merger with Trailmobile. As a result of this reduction of his seniority, Britt lost the opportunity for overtime work, was forced to work on the night shift, and was finally discharged, within his protected first year of employment (R. 4). Mappes, like Britt, entered military service before the merger of Highland and Trailmobile. When he returned from service, he was refused restoration to the position which he held at the time of entering military service, and instead, because of his reduced seniority, was re-employed on a different job, at a lower wage rate, and, in consequence of his lack of seniority, he was discharged in November 1946, within the first year of his employment (R. 14-16).

It will be noted immediately that the case involves the same background facts as *Trailmobile Co.* v. *Whirls,* 331 U. S. 40. Whirls was a Highland employee who had entered military service in 1942 and had been restored to his former position at the Highland Plant in May 1943. His seniority was not reduced until after June 23, 1944, the date of the new agreement, so that he had a full year's employment at his former position with unchanged seniority. 331 U. S., at 44. Whirls sued to set aside the reduction of his seniority after the statutory year, but this Court held that, after the statutory year, the test of any readjustment of seniority rights by the usual processes of collective bargaining is whether a veteran has been treated differ-

ently from non-veterans. Since the Trailmobile agreement met this test of equal treatment, the Whirls suit was dismissed. Throughout its opinion, this Court distinguished between the rights granted a veteran during the statutory year and those accruing to him after the statutory year. 331 U. S., at 56, 58-59, 60.

While the *Whirls* case was pending, the Trailmobile Company brought suit for a declaratory judgment, asking the court to declare that the June 23, 1944 agreement governed the seniority rights of all its Highland employees, who were named in an appended list which included Britt and Mappes.[2] This declaratory judgment suit was dismissed by the district court on the jurisdictional ground that only a veteran can sue to declare or enforce statutory reemployment rights. *Trailmobile Co.* v. *International Union UAW-CIO Local 392,* 67 F. Supp. 53 (S.D. Ohio). But after the *Whirls* decision was handed down, Trailmobile's appeal was rejected by the Court of Appeals for the Sixth Circuit, on June 4, 1947, in a *per curiam* decision which stated that:

> * * * it appearing that the same issues presented have been adjudicated by the Supreme Court in Trailmobile Company and International Union, U.A.W.-C.I.O. v Whirls, 67 S. Ct. 982, it is ordered, upon the authority

[2] The Ohio state courts, in 1946, held the 1944 agreement nondiscriminatory as against the entire class of Highland employees. *Hess* v. *The Trailer Co.*, 31 O.O. 566, 17 O. Supp. 39, 18 Ohio Bar 314. See 331 U. S., at 44-45.

> of the principles enunciated in that case, that the judgment of the District Court dismissing this cause be and the same is hereby affirmed. [162 F. 2d 720. (R. 6).]

The complaints in the case at bar were filed on September 30, 1948 (R. 1, 13). The district court dismissed the complaints on the ground that the decision of the Court of Appeals in *Trailmobile Co.* v. *International Union, supra,* dismissing the declaratory judgment suit, was *res judicata* (R. 7, 19). The Court of Appeals reversed (R. 24).

a. The opinion of the Court of Appeals (R. 24-31) is not altogether clear, and it contains some expressions which may be interpreted in different ways, but read as a whole we believe the opinion holds that (a) the decision in the declaratory judgment suit is adversely *res judicata* of respondents' claim to their pre-induction seniority positions *only* insofar as the period subsequent to the first year of reemployment is concerned, but that (b) the prior suit does *not* govern respondents' rights during the first year of reemployment. For the court states that at the time the district court decided the declaratory judgment suit, Britt and Mappes had not been discharged, and since *res judicata* does not apply to new situations, the declaratory judgment did not determine the legality of their discharge (R. 30). The court then goes on to remand the case to the district court to determine whether the respondents had been discharged without cause within the meaning of Section 8(c) of the Act (R.

31). In our view, this mandate leaves the district court free to hold, as it should, that respondents' discharge solely because of their reduced seniority was "without cause" and violated their right to maintain their pre-induction seniority throughout their first year of reemployment. On this reading, the case squarely presents the question whether a veteran can be discharged within the statutory year because of a lack of seniority resulting from a readjustment of his pre-induction seniority position by an otherwise valid collective bargaining agreement.

We are strengthened in our belief that the court below did not intend to hold the decision in the declaratory judgment action a barrier to the recognition of respondents' first-year seniority rights by the fact that this Court, in the *Whirls* case, was careful to distinguish first-year from post-first-year rights and to indicate the special status of the veteran during his statutory year: "For the statutory year indeed this meant that the restored rights could not be altered adversely by the usual processes of collective bargaining or of the employer's administration of general business policy." 331 U. S., at 58-59. "The only question here and the only one we decide is that § 8 (c), *although giving the reemployed veteran a special statutory standing in relation to 'other rights', as defined in the Fishgold case, during the statutory year, and creating to that extent a preference for him over nonveterans,* did not extend that preference for a longer time."

331 U. S., at 60 (italics supplied).[3] It cannot be assumed that the Sixth Circuit bench which rendered the decision in the declaratory judgment suit, applying "the principles" of the *Whirls* case (*supra*, pp. 5-6), failed to note the explicit distinction made by this Court between the protection granted by the statute during the statutory year and subsequent years. Nor can we assume that the different bench below[4] read the earlier decision apart from, and in conflict with, this Court's *Whirls* opinion. Rather than constituting a bar to the present suit, the decisions in the *Whirls* case, and in the declaratory judgment action, offer positive support and direction for the grant of relief to respondents.

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[3] This distinction was carefully preserved in *Aeronautical Industrial District Lodge 727* v. *Campbell*, *supra*; and *Oakley* v. *Louisville & Nashville R. R. Co.*, *supra*. In the *Campbell* case, the veteran complained that a shop steward with lesser seniority worked at his job while he was temporarily laid off during the statutory year, pursuant to a change in the union agreement, made after he entered military service, keeping shop stewards on the job regardless of seniority. The court held that this was a beneficial provision not violating the rule that "the Selective Service Act restricts a readjustment of seniority rights during the veteran's absence to the disadvantage of the veteran." 337 U. S., at 529. The case can also be distinguished on the ground that the shop steward's position was not a change in the seniority system, but an assignment outside of the seniority system. In the *Oakley* case, the Court held that the seniority accumulated during military service could not be deducted after the statutory year. It pointed out: "In the *Trailmobile* case, *supra*, at pages 56 and 60, we dealt with the one year of special statutory protection given to the veteran in his restored position. We said, in effect, that this provision protected him not only from the total loss of that position by 'discharge' from it 'without cause', but that it also protected him, for one year, against the loss of certain other benefits incidental to his restored position." 338 U. S., at 283-4.

[4] The court below consisted of Simons, Allen and McAllister, JJ. (R. 23); in *Trailmobile Co.* v. *International Union, et al.*, *supra*, it consisted of Hicks, Martin and Miller, JJ. (R. 5).

b. Alternatively, the Court of Appeals' opinion may be read as holding that (a) while a veteran's seniority rights can be reduced, in his first year of re-employment, by an otherwise valid nondiscriminatory collective bargaining agreement to the extent that pay and other work benefits dependent on seniority are concerned, he cannot be *discharged* because of such reduced seniority during the statutory period, and (b) the prior Sixth Circuit judgment does not bar respondents' claim for such a discharge. This distinction between "seniority rights" while at work and "discharge" because of a change in seniority we believe to be clearly erroneous, and contrary to this Court's decisions in *Fishgold, Whirls,* and *Oakley. Supra,* pp. 7-8. But since the present cases involve discharges, the court below reached the right result, on this reading of the opinion, though on partial and inadequate reasoning; and it is clear that on this interpretation the case also presents the question of whether a first-year discharge because of reduced seniority contravenes the statute's mandate. Cf. *Helvering* v. *Gowran,* 302 U. S. 238, 245-246.

c. Even if we are wrong in both of these readings, and the court below did hold the respondents barred, by the judgment in the declaratory judgment action, from claiming that their discharge because of reduced seniority violated Section 8(c), we believe that this Court may properly take the case and hold that, in the light of the *Whirls* opinion and the Sixth Circuit's prior decision, respond-

ents' present claim is not barred but that they were entitled to have their pre-induction seniority kept intact during the statutory year. The interpretation by the court below of the earlier declaratory judgment opinion would not be controlling since that decision was rendered by a differently constituted court of the same circuit and was wholly based on an opinion of this Court.

2. Petitioner, of course, reads the opinion below quite differently from either of the ways we have suggested. It assumes both that the Court of Appeals held respondents' claim of alleged discharge because of reduced seniority to have been adversely determined in the earlier suit, and also that this Court cannot disregard that holding of *res judicata.* In petitioner's view of the Court of Appeals' judgment, all that can now be left open to respondents is the opportunity to show that they were discharged, not because of reduced seniority, but for some unstated, unclaimed, and unpleaded improper cause, *e. g.*, malice on the part of a foreman. Petitioner therefore raises in this Court only the minor question of whether the court below erred in leaving even this small opportunity to respondents. But, as we have pointed out in some detail, this is not at all our view of the case. *Supra,* pp. 6-10. And we submit that there is no jurisdictional obstacle to the Court's granting the petition and considering the broad and significant issue we believe to be present, even though the petitioner has chosen to frame only narrow and unimportant questions because it

misconstrues the judgment below. It is the "case" which is before this Court on certiorari from a court of appeals (28 U. S. C. 1254), and if the Court desires to do so it can properly deal with any issue presented by the judgment which is sought to be reviewed. Cf. *Langnes* v. *Green*, 282 U. S. 531, 535-539; *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567-568; *Public Service Commission* v. *Havemeyer*, 296 U. S. 506, 509; *Olmstead* v. *United States*, 277 U. S. 438, 488 (Stone, J.).

We believe that the case, as we view it, warrants review and determination by this Court. The question of veterans' seniority rights during their first year of reemployment is important, especially now that military inductions are at an increasing rate, and the opinion below, though correct in result, contains serious ambiguities which may serve to mislead or perplex. There is need for the Court "to bring clarity out of confusion" (R. 24). Moreover, this Court's prior opinion in the *Whirls* case is directly involved. For these reasons, we do not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted,

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Solicitor General.

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